critical for both constitutional and statutory analysis, is one between, on the one hand, the asserted federal authority to engage in *land-use decisionmaking* for parcels bordering major commercial waterways and, on the other hand, the very different authority to enforce *water-quality preservation* or *water-pollution prevention* rules.

As explained in detail below, the Sixth Circuit confused these separate headings of federal authority and, as a result, lapsed into error. Most importantly, the Sixth Circuit mistakenly approved the Corps' assertion of authority to apply land-use decisionmaking regulations to the *Rapanos* and *Carabell* parcels—lands not "actually abutting" commercial waterways. By subjecting non-abutting wetlands to federal land-use regulations that can lawfully apply, if at all, only to parcels bordering the Nation's great commercial waterways, the Sixth Circuit departed from *SWANCC*, misapplied the Act, and permitted the Corps to exceed its authority under the Constitution.

ARGUMENT

I. THE SIXTH CIRCUIT'S EXPANSIVE READING OF THE CLEAN WATER ACT RENDERS THE ACT UNCONSTITUTIONAL.

These cases do not challenge the power of the Army Corps to regulate land use along the borders of major federal waterways. Nor do they challenge the power of federal agencies to regulate activities causing pollution of the Nation's water resources. What they most assuredly do challenge is the Corps' bid to arrogate authority over land-use decisionmaking for any and every wetland in the Nation. Even putting to one side the Clean Water Act, the Constitution forbids any such exercise of federal authority.

A. The Corps' Regulations Seek To Impose Nationwide Land-Use Requirements On A Vast Array Of Privately Owned Wetlands.

The Corps' regulations define the "waters of the United States" subject to the Corps' wetlands permitting requirements in the most expansive way conceivable. Specifically, the regulatory definition encompasses "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3). Of the many items on this lengthy listing, "wetlands" is the only one carrying a separate regulatory definition. The Corps' regulations provide: "[t]he term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency or duration to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." *Id.* § 328.3(b). The Corps further extends this already liberal definition to cover "[w]etlands adjacent to waters (other than waters that are themselves wetlands)." *Id.* § 328.3(a)(7). And section 328.3(c) of the Corps' regulations goes further still: defining "adjacent" as "bordering, contiguous, or neighboring," and then adding a proviso stipulating that even "[w]etlands *separated from* other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" *Id.* § 328.3(c) (emphasis added).

Having asserted jurisdiction over any plot wet enough "to support a prevalence of vegetation typically adapted for life in saturated soil conditions," the Corps and the United States Environmental Protection Agency ("EPA") proceed to make permitting decisions turn essentially on land-use considerations, such as whether aesthetic and ecological considerations warrant keeping these damp plots in a

perpetual condition of dampness. *See, e.g.*, 40 C.F.R. § 230.10 (prohibiting the discharge of pollutants that have significantly adverse effects on, among other things, "aesthetic" values). EPA regulations thus require that the Corps consider "the characteristics of the substrate at the proposed disposal site," as well as the "possible loss of environmental characteristics and values," including whether the discharge might affect "the complex physical, chemical, and biological characteristics of the substrate" or affect "bottom-dwelling organisms." *Id.* § 230.20(b). The regulations provide in particular that discharges may not adversely affect wildlife, *see id.* § 230.10(c)(1), including "loss or change of breeding and nesting areas, escape cover, travel corridors, and preferred food sources for resident and transient wildlife species associated with the aquatic ecosystem." *Id.* § 230.32(b).

In practice, the Corps has interpreted and applied its regulations broadly to exercise control over whether to allow or prohibit the dredging or filling of any and every wetland in the Nation. The Corps has consistently employed its nationwide regulations to prevent private landowners from making any improvements to wetland parcels, and has used its permitting authority to prevent and control development. In sum, the Corps' regulations applied in this case seek to achieve land-use goals, weigh land-use values, and drive land-use decisionmaking.

B. Under Our System Of Government, Land-Use Planning Is The "Quintessential" Function Of The States.

In stark contrast to the Corps' federal program of nationwide land-use regulation, this Court has often remarked that "[t]he regulation of land use is traditionally a function performed by local governments." *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 402 (1979); *see also Hess v. Port Auth. Trans-Hudson Corp.*,

513 U.S. 30, 44 (1994) (same); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (recognizing "the authority of state and local governments to engage in land use planning"); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Indeed, the Court has gone so far as to declare that "regulation of land use is perhaps the *quintessential* state activity." *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) (emphasis added). The Court accordingly has deemed land-use controls through zoning as "peculiarly within the province of state and local legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975). In a passage now commonplace in the Court's decisions, Justice Jackson emphasized that the Constitution's allocations of "differentiated governmental power" need not undermine the integration of these "dispersed powers into a workable government." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (concurring opinion). And so experience teaches with respect to the Constitution's reservation of land-use decisionmaking authority as a province of state and local governments.

States historically have taken leading roles in translating environmental science into effective conservation programs. Most relevant here, States have enacted extensive wetlands protection regimes, ranging from traditional permitting systems to incentive programs, "critical area" designations, and buffer zone requirements. This regulatory diversity reflects not only individual state preferences, but also "the [biological] diversity of freshwater wetland types across the nation." Jonathan H. Adler, *Wetlands, Waterfowl and The Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 49-50 (1999) (internal citation omitted) (noting that "many state supplemental programs deliberately exceed stringent federal wetlands regulations"). State efforts in the wetlands protection arena are further supplemented by wetlands protection measures enacted by thousands of local

governments. *See id.* at 48-52 (summarizing the history of state wetland regulation); *see also* Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377 (2005). State and local wetlands programs thus exemplify Justice Brandeis's observation that "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Nearly a decade before the Clean Water Act, Massachusetts embarked on the first statewide wetlands protection experiment. In 1963, Massachusetts enacted a pioneering program requiring state-issued permits as a precondition to filling or dredging of coastal wetlands. *See* Mass. Gen. Laws ch. 130, § 27A, 1963 Mass. Acts 426, repealed by 1972 Mass. Acts 784, § 2, superceded by Mass. Gen. Laws ch. 131, § 40 (1991). Massachusetts extended these protections to inland wetlands two years later—a full decade before the Corps began regulating wetlands. *See NRDC, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975) (directing that wetlands be regulated under section 404). Although the Massachusetts law was the first state-level statute, it was far from the first local government initiative to protect wetlands. Rather, the Massachusetts law itself was "based on a number of local zoning permit requirements already to be found in coastal states." Alexandra D. Dawson, *Massachusetts' Experience in Regulating Wetlands in Wetland Protection: Strengthening the Role of the States* 255 (Ass'n of State Wetland Managers, 1985).

Nor did Massachusetts act alone. Other States, including Connecticut, Georgia, and Washington, all took active wetlands protection measures in the 1960s. In fact, by the time federal wetlands regulations were promulgated in 1975,

every coastal State but one had adopted coastal wetlands protections, and eleven States had passed statutes to protect freshwater wetlands as well. *See* Jon A. Kusler *et al.*, *State Wetland Regulation: Status of Programs and Emerging Trends* 1 (Ass'n of State Wetland Managers, 1994); *see also* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 578-79 (2001) (discussing substantial environmental progress achieved by the States prior to 1970).

These fruitful, longstanding wetlands protections are now threatened by the Clean Water Act's growing displacement of state and local land-use law. As of 2000, the Corps was approving approximately 85,000 permits each year for the use or modification of designated wetlands. *See* Release No. PA-00-05, *U.S. Army Corps of Engineers Announces Replacement Nationwide Permits*, available at http://www.hq.usace.army.mil/cepa/releases/nationwidepermits.htm. (visited on December 1, 2005). Notwithstanding these thousands of approvals, the Corps regularly brings enforcement actions against landowners, large and small, for actions such as building vacation homes. *See Regulatory Warning: Hearings Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 104th Cong. (1996) (statement of Robert McMackin) (describing the Corps' determination that construction of a vacation home on a third of an acre lot violated federal wetlands regulations).

After *SWANCC*'s announcement of limits on federal regulatory authority, the States stood poised, not to abandon their wetlands to out-of-control development, but to repatriate wetlands protections back to the levels of government closest to the citizenry. At least 19 states responded to *SWANCC* "by either enacting or recommending the enactment of laws" designed to protect wetlands that might no longer be subject to federal jurisidiction. Michael J. Gerhardt, *The Curious Flight of the Migratory Bird Rule*, 31

ENVTL. L. REP. 11079, 11085 (2001); *see also* Caleb A. Jaffe, *Tragedy of the Wetlands Commons: What the Virginia Nontidal Wetlands Resources Act Says About The Future Of Environmental Regulation*, 20 VA. ENVTL L.J. 329 (2001). That is, as this Court "restricted federal regulatory jurisdiction over wetlands," the States began to take up the slack by expanding their own "wetland protection." Jonathan H. Adler, *Letting Fifty Flowers Bloom: Transforming The States Into Laboratories Of Environmental Policy*, available at http://www.federalismproject.org/masterpages/environmen t /flowers.pdf (visited on December 1, 2005). To be sure, the Corps' passive resistance to *SWANCC*—and the resulting ambiguity as to the ultimate contours of federal wetlands protections—may have "discourage[d] states from filling the gaps." Jonathan H. Adler, *The Fable of Federal Environmental Regulation: Reconsidering The Federal Role In Environmental Protection*, 55 CASE W. RES. L. REV. 93, 112 (2004). But this hesitancy is unsurprising given the uncertainties as to "how much of a gap" ultimately would be left to fill. *Id.* Precisely because "state governments are not likely to squander scarce resources duplicating federal regulations," the Corps' passive resistance and the resulting "lack of clear boundaries on federal regulation" have likely resulted in "lower levels of environmental protection." *Id.* at 112-13.

C. The Corps' Regulations Violate Constitutional Federalism Principles.

In light of States' wetlands-preservation authority, experience, and track record of success, the *de facto* displacement of state and local land-use decisions represented by the Corps' nationwide, 85,000-permit-strong, land-use program constitutes an unwise, as well as unconstitutional, departure from our structure of government. This Court recognized in *Gregory v. Ashcroft* that the "federalist structure of joint sovereigns preserves to the people numerous advantages." 501 U.S. 452, 458 (1991).

Accordingly, the federal government, "anxious though it may be to vindicate and protect federal rights and federal interests," *Younger v. Harris*, 401 U.S. 37, 44 (1971), needs ever to recall that it exists as a government of defined and enumerated powers. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (Marshall, C.J.); The Federalist No. 45 (James Madison).

This Court recognized in *United States v. Lopez*, 514 U.S. 549 (1995), and in *United States v. Morrison*, 529 U.S. 598 (2000), and, most recently, in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), that the scope of congressional power under the Commerce Clause, while broad, is necessarily limited by the fact that the federal government is one of enumerated powers. The Commerce Clause authorizes Congress to regulate only (i) the "channels of interstate commerce;" (ii) the "instrumentalities of interstate commerce or persons and things in interstate commerce;" and (iii) "those activities having a substantial relation to interstate commerce." *Lopez*, 514 U.S. at 558-59. As applied to the *Carabell* and *Rapanos* parcels, however, the Corps' regulations simply cannot be squared with these minimum constitutional requirements. To be sure, wetlands bordering commercial waterways might conceivably be deemed subject to federal jurisdiction as part and parcel of those waterways—that is, as part and parcel of "instrumentalities of interstate commerce." *Id.* at 558 (stating that "instrumentalities" category includes statutory provisions applicable to "aircraft" and "vehicles used in interstate commerce") (citations omitted). But neither the *Carabell* parcel nor the *Rapanos* parcel borders a commercial waterway. As applied here, the Corps' regulations may be upheld, if at all, only as regulations of "activities that substantially affect interstate commerce."

Lopez and *Morrison* establish that regulatory programs are constitutional on "affecting commerce" grounds only where the regulatory regime focuses on economic endeavors, *Lopez*, 514 U.S. at 560; includes an "express jurisdictional

element" limiting its reach to commercial activities, *id*; or contains detailed legislative or statutory findings describing effects on commerce that otherwise might not be "visible to the naked eye." *Id.* at 562. As further described below, however, the regulation of commercial enterprise—voluntary exchanges of goods or services for value—is not the focus of the Corps' regulatory program; instead, the program functions as a sort of national zoning board governing land uses for virtually every damp plot of ground. Moreover, neither the Clean Water Act nor the Corps' regulations contain an express jurisdictional element limiting the Act's reach to proposed "discharges" having "a substantial effect on interstate commerce." *Id.* at 560. Finally, neither the Act nor its legislative history contains "express congressional findings regarding" the commercial effects of transferring land-use decisionmaking by state and local governments to the Army Corps in Washington. *Cf. Morrison*, 529 U.S. at 612. As this Court noted in *SWANCC*, the Act's legislative history gives no indication that Congress intended to exercise authority over wetlands not bordering commercial waterways, much less that Congress descried otherwise hidden economic benefits to a centralized, nationwide, 85,000-permit-strong, land-use program. *See SWANCC*, 531 U.S. at 168 n.3.

The Corps' statutory interpretation is additionally infirm because it sweeps broadly into areas of traditional state authority. *See Morrison*, 529 U.S. at 613. Instead of recognizing "any limitation on federal power" in the area of local land-use regulation, *Lopez*, 514 U.S. at 564, the Corps purports to regulate even the most basic acts by landowners, including "the construction or expansion of a single-family home and attendant features (such as a garage, driveway, storage shed, and/or septic field) for an individual permittee." *Final Notice of Modification of Nationwide Permit 29 For Single Family Homes*, 64 Fed. Reg. 47,175, 47,178 (Aug. 30, 1999) (providing final notice of modification of permits

involving single family housing). In fact, the Corps asserts jurisdiction over even trivial activities: "[w]alking, bicycling or driving a vehicle" through a wetland all might fall within the Corps' jurisdiction because all of these activities could result in "discharge of dredged material." *Clean Water Act Regulatory Programs*, 58 Fed. Reg. 45,008; 45,020 (Aug. 25, 1993). Under existing regulations, the Corps has even required permits for residential construction impacting closet-sized (26 square feet) and recreation-room-sized (400 square feet) parcels of wetlands. *See* Virginia S. Albrecht & Bernard N. Goode, *Wetland Regulation in the Real World* ix (1994).

If this Court were "to adopt the Government's expansive interpretation," then "hardly a [parcel of] land would fall outside the federal statute's domain." *Jones v. United States*, 529 U.S. 848, 857 (2000). The Court accordingly should decline the Corps' invitation—accepted by the Sixth Circuit—to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567. "Congress may regulate non-economic interstate activities *only* where the failure to do so 'could ... undercut' its regulation of interstate commerce." *Gonzales*, 125 S. Ct. at 2218 (J. Scalia, concurring) (citing *Lopez*, 514 U.S. at 561) (emphasis added). Here, however, the Corps' program of land-use regulation has nothing to do with "commerce" or any sort of "economic enterprise," however broadly one might define those terms. *Lopez*, 514 U.S. at 561. Nor is the Corps' regulatory regime an essential part of "a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Gonzales*, 125 S. Ct. at 2210 (quoting *Lopez*, 514 U.S. at 561).

In sum, the Army Corps' permitting program needlessly injects federal regulatory authority into all manner of

traditional, local activity without regard to the commercial nature or economic effects of those activities. State and local land-use agencies that have carefully reviewed the likely impacts of proposed landowner improvements to wetlands have become distressingly accustomed to seeing their considered decisions vetoed by federal agencies that admit no need to tie those vetos to commercial objectives. The Corps' interpretation of the Clean Water Act unwisely and unconstitutionally shutters the very state laboratories that have produced significant pioneering achievements in wetlands protection.

II. THE SIXTH CIRCUIT'S EXPANSIVE READING OF THE CLEAN WATER ACT CANNOT BE SQUARED WITH SWANCC.

This Court's holding in *SWANCC* is the beginning and end of this case: the text of the Clean Water Act does not remotely invite the Corps to invade traditional state prerogatives over land-use decisionmaking. Instead of recognizing the significant constitutional federalism concerns presented in, and clear statutory text governing, this case, however, the Sixth Circuit gave unlawful deference to the Corps' administrative interpretation and wrongly upheld the Corps' challenged regulations.

A. The Clean Water Act Does Not Prohibit The Employment Of Fill Materials For Purposes Of Improving Privately Owned Parcels Of Land.

In cases like this one where the federal government seeks to interfere in matters of local concern so as to "upset the usual constitutional balance of federal and state powers," it is "incumbent upon the federal courts to be certain of Congress'[s] intent." *Gregory*, 501 U.S. at 460 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985)). When Congress intends to intrude on "the usual constitutional balance of federal and state powers," it should clearly state its intention to do so. *Id.* at 460.

This venerable principle takes on added force when courts are asked to construe an *administrative interpretation* of the law. Courts should not "needlessly reach constitutional issues" nor presume that Congress "casually authorizes administrative agencies to interpret a statute to push the limit of congressional authority." *SWANCC*, 531 U.S. at 172-73. Deference that might otherwise be due under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), is simply not applicable in cases where, as here, an agency interpretation raises grave constitutional concerns. *Cf. Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). As this Court has emphasized, "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power," there must be a "clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172 (quoting *DeBartolo*, 485 U.S. at 575).

As noted above, land-use development and control has long been the province of state and local regulation. Indeed, "regulation of land use is perhaps the quintessential state activity." *FERC v. Mississippi*, 456 U.S. at 767 n.30; *see also Lake Country Estates*, 440 U.S. at 402; *Hess*, 513 U.S. at 44; *Dolan*, 512 U.S. at 384; *Village of Euclid*, 272 U.S. at 365; *Warth*, 422 U.S. at 508 n.18. Accordingly, unless this Court determines that Congress *expressly* authorized the Corps' intrusive, nationwide program of land-use controls, it is bound to invalidate the Corps' challenged regulations.

The statutory provision invoked by the Corps in these cases, Clean Water Act section 404(a), authorizes the Corps to "issue permits ... for the discharge of *dredged* or *fill* material into the navigable waters at specified *disposal* sites." 33 U.S.C. § 1344(a) (emphasis added). "Dredged" material refers to material that has been collected or brought up from the bottom of a river, *see* THE COMPACT OXFORD ENGLISH DICTIONARY 476 (1989), ordinarily for purposes of clearing channels for navigation. Dredged material is therefore

typically comprised of waste or refuse taken from lands lying beneath water. The reference to "dredged" waste materials, combined with the statute's reference to "disposal sites" strongly suggests that Congress was concerned about waste materials being discarded in the Nation's navigable waterways. *Cf. National Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998) (emphasizing that the Act does not apply to the removal of material from the waters of the United States). This in turn suggests that the Clean Water Act, consistent with its overall pollution control objectives, was *not* intended to establish a regime of land-use controls. Rather the statute was primarily intended to modulate the "discharge" at "disposal sites" of "dredged" materials and similar wastes—that is, to prevent the lands submerged beneath navigable waters from becoming severely polluted dumping grounds.

Section 404(a)'s objective of controlling "disposals" of waste—as opposed to regulating improvements to private property in the manner of a zoning board—is further confirmed by the Act's section 404(c). That close neighbor to section 404(a) states that the EPA Administrator "is authorized to prohibit the specification" of "any defined area" as "a disposal site," *id.* § 1344(c)(2), so long as there appear to be good and sufficient ecological reasons for doing so. Under a plain reading of the statute, this provision is unexceptional: it means simply that the EPA may declare particularly sensitive lands off limits to waste-disposal activity. But under the Corps' interpretation, the provision is truly extraordinary: it grants EPA the authority to identify parcels that will be deemed entirely off limits to development. Under the Corps' view, EPA may refuse to specify any undeveloped wetland as "a disposal site" and thus effectively expropriate its entire economic value. *Cf. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (local land-use regulation that prohibits all development and deprives parcel of all economic value

constitutes compensable Fifth Amendment Taking). Moreover, under the Corps' view, EPA can invoke this sweeping authority based on nothing more than "an unacceptable adverse effect" on things such as "wildlife" or "recreational areas." The Corps' section 404(c) reading crowns EPA's Administrator as the *uber*-arbiter of nationwide development and land-use decisionmaking.

The extreme implausibility of the Corps' statutory interpretation is further confirmed by its implications for even environmentally conscientious landowners. Consider, for example, a hypothetical landowner who cordons off a privately owned wetland; drains its water; and then fills the newly dry land with rock, sand, dirt, and gravel to prepare the ground for construction. Assuming that the drained waters were cleaned and filtered before being discharged off the property—thus preventing the discharge of any dredge or fill materials into any United States waters—there can be no claim that this hypothetical landowner has "discharged" anything but clean water itself into any "waters of the United States." There accordingly can be no claim that the landowner requires a section 404 permit under any reasonable reading of the Act. Nonetheless, the Corps' regulations would require this landowner to seek, and in many cases would require the Corps to deny, the issuance of such a permit.

It bears emphasis in this regard that Congress modeled the Clean Water Act's permitting requirements on the Rivers and Harbors Act of 1899 (also known as the "Refuse Act"). *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 319 (1982) (noting that Congress "drew extensively ... upon the existing enforcement provisions of the Refuse Act of 1899"). Specifically, Congress sought to improve the pre-existing statutory scheme by filling the "significant gaps" that had rendered that Act "seriously inadequate." S. Rep. No. 92-414 (1971), reprinted in 1972, U.S.C.C.A.N. 3668, 3736; *see also id.* at 3672. Significantly, the Rivers and Harbors Act

did not grant federal authority to control standing waters on private property, but was instead limited "to water bodies that were deemed 'navigable' and therefore suitable for moving goods to or from markets." *SWANCC*, 531 U.S. at 182.

Relatedly, the Court should also bear in mind that "lands underlying" the Nation's navigable commercial waterways "have historically been considered 'sovereign lands.'" *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997) (citation omitted); *see also Utah Div. of State Lands v. United States*, 482 U.S. 193, 195-98 (1987). Indeed, because navigable waters "uniquely implicate sovereign interests," *Idaho v. Coeur d'Alene*, 521 U.S. at 284, and because "submerged lands are held for public purpose," *id*, the government has very limited authority to convey to private parties lands submerged beneath navigable waters. *See, e.g.*, *Utah Division*, 482 U.S. at 197-98; *Idaho v. Coeur d'Alene*, 521 U.S. at 285 (discussing *Illinois Central R. Co. v. Illinois*, 146 U.S. 387 (1892) (holding that the Illinois Legislature lacked authority to transfer title to submerged lands beneath navigable waters). This distinction between inherently sovereign holdings of lands submerged under navigable waters and private lands not under water helps explain the Act's focus on "disposals" into "navigable" waters. In particular, so long as section 404(a) is limited to "disposals" onto submerged, sovereign lands lying underneath navigable waters, there is no constitutional concern with displacing state land-use regulation of private property. That is, so long as the Corps' permits are required only for such disposals, its program, by definition, will steer clear of any displacement of state regulatory authority over land-use decisionmaking.

Finally, the overall pattern of federal and state land-use and pollution controls also bears mentioning. It may be significant, for instance, that the principal federal vehicles for providing land-use controls protecting aquatic ecosystems are not regulatory statutes like the Clean Water Act, but statutes authorizing the designation of areas as national parks, forests,

wilderness areas, and the like. The Secretary of the Interior is charged with developing a National Wetlands Priority Conservation Plan, which prioritizes types of wetlands for federal acquisition purposes. *Id.* § 3921(b). The Emergency Wetlands Resources Act of 1986 provides revenue-raising mechanisms for funding wetlands acquisition efforts, *see* 16 U.S.C. §§ 3901 *et seq.*, and the Water Bank Act provides certain alternative and non-traditional means by which the government may acquire protective interests in wetlands. *See* 16 U.S.C. §§ 1301-1311. Similarly, the North American Wetlands Conservation Act provides for the acquisition, management, enhancement, and restoration of wetlands for the purpose of protecting the habitats of migratory birds and other wildlife. *See* 16 U.S.C. §§ 4401-4413. The federal government accordingly manages extensive holdings of critical wetlands under aegis of the National Wildlife Refuge System and National Park Service. *See* National Wildlife Refuge System, 16 U.S.C. §§ 668dd-668ee; *see also* 16 U.S.C. § 1.

In contrast to the congressional practice of largely respecting state land-use regulation (while supplementing state efforts with federal land acquisitions), Congress has largely seized control over water-quality regulation and pollution control. Congress passed the Clean Water Act for the stated purpose of pollution control—that is, restoring and maintaining "the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act concededly constitutes "an all-encompassing program of *water pollution regulation*." *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 318 (1981) (emphasis added); *see also Arkansas v. Oklahoma Envtl. Prot. Agency*, 503 U.S. 91, 111 (1992); *International Paper Co. v. Ouellette*, 479 U.S. 481, 485 (1987). The Clean Water Act thus establishes a "comprehensive program for controlling and abating *water pollution*," *City of Milwaukee*, 451 U.S. at 319 (emphasis added), indicating that Congress intended "to dominate the

field of *pollution regulation*." *Int'l Paper*, 479 U.S. at 492 (emphasis added).

In sum, the larger array of congressional enactments exhibits a pattern of accomplishing land-use goals without federal regulatory controls on private property, together with an undoubted willingness to regulate where bona fide pollution controls are needed. Consistent with *SWANCC*'s recognition that the Corps' authority should be interpreted to avoid unintended federal encroachments into local land-use determinations, *see SWANCC*, 531 U.S. at 173, Congress seems to have understood the critical distinction between, on one hand, the regulation of land use and, on the other hand, the prevention and reduction of water pollution. The Corps' regulations are unlawful (as well as unconstitutional) precisely because they ignore the tsunami of statutory evidence showing that Congress never intended the Clean Water Act to form an exception to this overall pattern.

B. *Riverside Bayview* Cannot Be Read To Give The Federal Government Authority To Make Land-Use Determinations For Wetlands Not "Actually Abutting" Navigable Waters.

The interpretive evidence detailed above escaped notice below largely because the Sixth Circuit became entranced with this Court's decision in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). In this vein, the Sixth Circuit erred most egregiously by invoking *Riverside Bayview* to support giving deference to the Corps' regulations. But although *Riverside Bayview* did indeed grant the greatest conceivable deference to the Corps' administrative interpretations (and thus failed to provide any real analysis of statutory structure and text), that was because *Riverside Bayview* litigants framed only a weak takings constitutional challenge, not the serious federalism-based challenge they might have put forward. To be sure, in framing their mid-1980s case, the *Riverside Bayview* litigants

were likely misled by contemporaneous views suggesting that, after *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), this Court would demur in perpetuity from recognizing meaningful Article I limits on congressional power. *See, e.g.*, Geoffrey R. Stone, *et al.*, CONSTITUTIONAL LAW 181 (1986) (devoting a chapter to "The Purported Demise of Judicially Enforced Federalism Limits On Congressional Power"). But those views have now been definitively rejected by the Court's decisions in *Gregory*, *Lopez*, *Morrison*, and *SWANCC* itself—all of which make clear that Congress' Commerce Clause power, while broad, is *not* unlimited. *Cf. Agostini v. Felton*, 521 U.S. 203 (1997) (overruling *Aguilar v. Felton* because of subsequent legal developments). The important point is that the Sixth Circuit below inexplicably failed to account for the fact that *Riverside Bayview* was litigated—however understandably—in a most unusual posture that undercuts the continuing vitality of almost all of its reasoning.

To be sure, *SWANCC* did at least assume for purposes of argument the continuing vitality of *Riverside Bayview*'s narrow holding. *SWANCC* thus assumed that "the Corps had [section] 404(a) jurisdiction over wetlands that actually abutted on a navigable waterway." *SWANCC*, 531 U.S. at 167. *Riverside Bayview*, as interpreted by *SWANCC*, accordingly requires as a basis for federal Clean Water Act jurisdiction a "significant nexus" between regulated land and United States waters such that the water on the regulated parcel be "inseparably bound up with 'waters' of the United States." *Id.* at 167 (internal citation omitted). This gloss on *Riverside Bayview* is best read in light of *Riverside Bayview*'s own observation that:

> the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one.

> Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land.

474 U.S. at 132.

After *SWANCC*, *Riverside Bayview* stands at the very most for the view that the Constitution and Clean Water Act empower Army Corps officials to make land-use decisions for federal "enclaves" loosely defined—including not only federal territories, the District of Columbia, national forests, wilderness areas, and parks, but also, critically, wetlands within the necessarily less-than-determinate bounds of waterways deemed within some traditional view of "navigability." These lands include, at a minimum, wetlands bordering major commercial waterways like the wetlands bordering Lake St. Clair at issue in *Riverside Bayview* itself. The shores, and even paths, of the Nation's great commercial waterways—like the Mississippi River, St. Lawrence Seaway, Great Lakes, and territorial seas—are often extensively molded by Army Corps levees, dikes, locks, dams and other manmade structures. *SWANCC*'s gloss on *Riverside Bayview* recognizes this pervasive federal imprint and holds that, to the extent that *Riverside Bayview* remains valid at all, it means the following: once the Army Corps or other federal officials have assumed responsibility for managing a waterway for commercial purposes (such as navigation or flood-control), federal officials may also take the extra step of exercising ancillary land-use authority over the waterway's bordering wetlands.

Under this view of federal land-use authority, the issue of the Army Corps' regulatory jurisdiction boils down to two conceptually unproblematic (if empirically difficult) questions: (i) whether a given commercial waterway has been so pervasively subjected to federal control, or Army Corps

improvements, or commercial traffic that it may be deemed an "instrument of interstate commerce" such that the Corps may exercise an ancillary land-use authority along its banks; and (ii) whether, as a *spatial* matter, a particular wetlands parcel is within or beyond the "point at which water ends and land begins." *Id.* at 132. Hence, to the extent it has continuing validity, *Riverside Bayview* stands for the narrow proposition that wetlands "actually abutting" navigable waters constitute an exception to the rule that land-use decisionmaking is the *exclusive* province of local government. As to these wetlands, and these wetlands alone, the Army Corps' land-use regulations might arguably be lawfully applied.

III. THE CORPS EXCEEDED ITS AUTHORITY IN ASSERTING LAND-USE JURISDICTION OVER THE CARABELL AND RAPANOS WETLANDS.

The land-use focus of the Corps' regulatory program is fatal to its bid to apply that regime to the *Rapanos* and *Carabell* wetlands at issue here. For instance, June and Keith Carabell's wet parcel of land contains a "wetland" that is not in any sense "adjacent [to] open water." *Carabell v. U.S. Army Corps of Engr's*, 391 F.3d 704, 708 (6th Cir. 2004) (noting that a ditch running alongside the Carabell's land is connected to a drain, which empties into a creek, which, in turn, empties into Lake St. Clair). Moreover, like the *SWANCC* wetland, the *Carabell* wetland is hydrologically isolated: it has no hydrological connection with any water of the United States. A berm barrier (piled up more than fifty years ago) prevents any flow of water, however minor, between the Carabell's land and neighboring properties. *Id.* The *Carabell* wetland, like the *SWANCC* wetland, is therefore inundated with "nonnavigable, isolated, intrastate waters" that are "clear[ly]" outside the scope of section 404(a). *SWANCC*, 531 U.S. at 172. There is simply no bordering navigable waterway or hydrological connection

to provide the necessary "significant nexus" between the Carabell's property and a "water of the United States."

The Sixth Circuit nonetheless fixated on the fact that the *Carabell* wetland was physically close to a man-made drainage ditch, which flows into a drain, which flows into a creek, which flows into Lake St. Clair, which lies between two of the five Great Lakes. Based on this physical closeness to property forming part of the web of hydrological connections that drain water off the North American continent and out to sea, the Sixth Circuit concluded that the *Carabell* property was an "adjacent wetland" subject to Army Corps land-use restrictions. But as this Court already clarified in *SWANCC*, wetlands are subject to the Corps' jurisdiction only where they have a "significant nexus to" or are "inseparably bound up with 'waters' of the United States." *Id.* at 167. Taken together, *SWANCC* and *Riverside Bayview* make clear that such a nexus or bond may be forged in only one of two ways: through bordering a major commercial waterway, or, alternatively, through significant affects on the quantity or quality of water available for use in interstate commerce. Against this backdrop, the Sixth Circuit plainly erred. There is no claim here that the *Carabell* wetland, like the *Riverside Bayview* wetland, "actually abuts" a major commercial waterway. Likewise, there also is no claim (much less any evidence) that the development restrictions the Corps seeks to impose aim at a lawful goal such as preserving the quality of United States waters lying outside the *Carabell* parcel itself.

In *Rapanos*, the Sixth Circuit fixated, not on physical proximity, but on an intermittent, indirect, and remote surface water runoff connection to navigable waters. Yet here again, there is no allegation that the *Rapanos* parcels actually border a navigable commercial waterway. For instance, the Sixth Circuit determined that one of the *Rapanos* parcels has a hydrological surface-water connection to navigable waters because the wetlands lie next to a

manmade ditch that flows into a non-navigable stream that connects with a river that ultimately flows into the Saginaw Bay in Lake Huron. To be sure, it is undisputed that the Rapanos expanded drains, built roads, removed stumps, moved dirt, dumped sand, and attempted to fill the wetlands on their private property. But there has never been any assertion (much less any evidence) that dredged or fill material—as opposed to surface water—was ever discharged by the Rapanos into navigable waters. Hence, the *Rapanos* wetlands may be regulated, if at all, only pursuant to the Clean Water Act's grant of water-quality-preservation authority, *see* 33 U.S.C. § 1251(a), not pursuant to the Corps' land-use regulations promulgated on authority of section 404.

Given the above, it is plain that the repudiated Migratory Bird Rule is indistinguishable from the "adjacency theory" advanced by the Corps and accepted by the Sixth Circuit. As *SWANCC* emphasized, the Corps' authority to regulate discharges of dredged and fill materials into "navigable waters" does not include the authority to make land-use decisions for virtually any and every wetland. 531 U.S. at 168. As with the Migratory Bird Rule, the jurisdictional basis asserted here "assume[s] that 'the use of the word navigable in the statute ... does not have any independent significance.'" *Id.* at 172 (citation omitted). But, as *SWANCC* itself noted, "it is one thing to give a word limited effect and quite another to give it no effect whatever." *Id*; *see also Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("[i]t is our duty 'to give effect, if possible, to every clause and word of a statute'") (citation omitted). If *any* spatial proximity (as in *Carabell*) or hydrological connection (as in *Rapanos*) suffices to provide the "significant nexus" *SWANCC* requires, then "navigable" will impermissibly cease to have independent import—much as it did under the Corps' unlawful Migratory Bird Rule. The Sixth Circuit decisions below, like the Seventh Circuit's reversible error in

SWANCC, impermissibly reads "navigable" right out of the Clean Water Act.

* * * * *

This case is "about federalism," which, along with separation of powers, is one of the two most essential structural elements of our Constitution. *Coleman v. Thompson*, 501 U.S. 722, 726 (1991). Having "split the atom of sovereignty," the Framers determined that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). For these dual capacities to be meaningful, however, they must continue to correspond to a two-tiered system of well allocated governmental responsibilities. That system of allocated responsibilities traditionally and effectively assigns regulatory authority over land usage to state and local governments. These cases afford the Court a tailor-made opportunity to reaffirm and respect that assignment.

CONCLUSION

For the reasons stated, the Court should grant the writs of *certiorari*.

Respectfully submitted,

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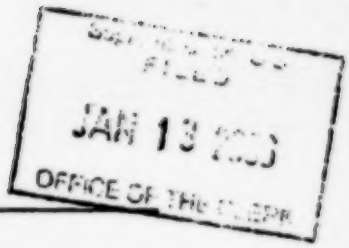

IN THE

Supreme Court of the United States

JOHN A. RAPANOS, et al., *Petitioner*,
v.
UNITED STATES OF AMERICA, *Respondent*.

JUNE CARABELL, et al., *Petitioner*,
v.
UNITED STATES ARMY CORPS OF ENGINEERS,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL MITIGATION BANKING ASSOCIATION IN SUPPORT OF THE RESPONDENTS

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Jeffrey A. Zinn and Claudia Copeland, *Wetland Issues*, Congressional Research Service, CRS IB97014 (updated June 2, 2005) 8, 11

The National Mitigation Banking Association submits this Brief Amicus Curiae, with the consent of the parties, in support of the United States to demonstrate that the regulated economic activity here at issue – the discharge of dredged and fill material into intrastate waters adjacent to non-navigable tributaries of traditional navigable waters, and the attendant mitigation of those impacts – substantially affects interstate commerce in the aggregate.[1]

INTEREST OF AMICUS CURIAE

The National Mitigation Banking Association ("Association") represents commercial businesses committed to the restoration and preservation of our nation's wetlands and natural habitat through the use of mitigation and conservation banks. The Association's members have established and operated mitigation banks throughout the United States since the early 1990s.

Wetland mitigation banking is a business that offers compensatory mitigation, through sale of mitigation credits, to entities that must provide mitigation for filling of wetlands subject to Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344.[2] Mitigation bankers are in the business of

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[1] Pursuant to Supreme Court Rule 37.6, Amicus states that this brief was not authored or funded by any person or entity other than Amicus or its counsel.

[2] *See, e.g.*, James Salzman & J.B. Ruhl, "No Net Loss" – Instrument Choice in Wetlands Protection," in MOVING TO MARKETS IN ENVIRONMENTAL REGULATION: TWENTY YEARS OF EXPERIENCE (J. Freeman & C. Kolstad, eds., Oxford University Press forthcoming 2006) (discussing history of mitigation banking and the "shift in emphasis from prescriptive regulation to trading") chapter available at http://eprints.law.duke.edu/archive/00001238/ (sited last visited January 9, 2006); Leonard A. Shabman and Paul Scodari, "Past, Present and Future of Wetlands Credit Sales," Resources for the Future Discussion

restoring, enhancing and sometimes creating wetlands, in advance, to sell as compensatory mitigation when mitigation cannot be achieved at the development site.[3]

Amicus submits this brief for a limited purpose. If this Court reaches the constitutional issues presented by the cases and applies the "substantially affecting" branch of its Commerce Clause jurisprudence, the Association submits that the widespread, interstate economic enterprises involved

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Paper 04-48 (December 2004) available at http://www.rff.org/rff/Publications/Discussion_Papers.cfm (site last visited January 6, 2006); Royal C. Gardner, Rehabilitating Nature: A Comparative Review of Legal Mechanisms That Encourage Wetland Restoration Efforts, 52 Catholic Univ. L. Rev. 573 (2003); "Swapping Swampland," by Katherine Ellison, Fortune Magazine, April 15, 2002; Lisa A. Wainger, Dennis King, James Salzman & James Boyd, Wetland Value Indicators for Scoring Mitigation Trades, 20 Stan. Envtl. L.J. 413 (2001) (case study of Little Pine Island Mitigation Bank in Florida); National Research Council, *Compensating for Wetland Losses Under the Clean Water Act* (National Academy Press, 2001) at 64-69; J.B. Ruhl & R. Juge Gregg, Integrating Ecosystem Services into Environmental Law: A Case Study of Wetlands Mitigation Banking, 20 Stan. Envtl. L.J. 365 (2001) (assessing wetland mitigation banking as "government and industry moved toward the banking program as a cornerstone of wetlands mitigation"); Royal C. Gardner, Banking on Entrepreneurs: Wetlands, Mitigation Banking, and Takings, 81 Iowa L. Rev. 527, 557-63 (1996); Steve Gatewood, Disney Banks on Mitigation, 17 Nat'l Wetlands Newsl. 7 (Sept.-Oct. 1995).

[3] In 1995, the Environmental Protection Agency and the Army Corps of Engineers issued Federal Guidance on the Establishment, Use, and Operation of Mitigation Banks, 60 Fed. Reg. 58,605 (November 28, 1995) (the Guidance), which provided: "The objective of a mitigation bank is to provide for the replacement of the chemical, physical and biological functions of wetlands and other aquatic resources which are lost as a result of authorized impacts. Using appropriate methods, the newly established functions are quantified as mitigation 'credits' which are available for use by the bank sponsor or by other parties to compensate for adverse impacts (i.e., 'debits')."

in wetland restoration and enhancement under the Section 404 program provide constitutional authority for application of the CWA to wetlands adjacent to non-navigable tributaries. For this reason, the judgments of the lower courts should be affirmed.

SUMMARY OF ARGUMENT

In the CWA, Congress regulated the activity of discharging dredged and fill material into waters of the United States and the restoration and mitigation businesses associated with this filling. Mitigation businesses operate in interstate commerce. Congress has expressly encouraged the wetland mitigation banking industry by enacting legislation establishing a preference for mitigation banking to offset impacts of federally funded highway projects. 23 U.S.C. §§ 103(b)(6)(M) and 133(b)(11).

Application of the CWA to wetlands adjacent to non-navigable tributaries is a permissible exercise of authority under the Commerce Clause. The mitigation banking and restoration industries regulated under the Clean Water Act are interstate commercial interests. Under the "substantially affecting" standard, the aggregate effect of these industries on interstate commerce independently justifies federal regulation of wetlands adjacent to non-navigable waters.

ARGUMENT

I. WETLAND MITIGATION BANKING IS A ROBUST INTERSTATE ECONOMIC INDUSTRY REGULATED UNDER THE CWA.

Under the Section 404 program, Congress chose to regulate commercial activity, by prohibiting discharges

without a permit[4] to limit and control the pollution entering and impacting the nation's waters. The statute requires dischargers to obtain a permit for discharge of dredged and fill material into waters of the United States and to provide appropriate mitigation, 40 C.F.R. Subpart H, §§ 230.70-230.77; 33 C.F.R. § 320.4(r).[5] Congress and the regulatory agencies have recognized that mitigation banking is a preferred method of wetland mitigation, utilizing private sector economic incentives to produce environmentally sound outcomes. A network of interstate commercial activity is involved with mitigation and restoration industries.

Mitigation banking is a market-based industry which involves creation of sites of advanced, consolidated mitigation for the express purpose of compensating for the adverse impacts on wetlands authorized by a Section 404 permit. Mitigation banking is frequently used to offset the adverse impacts of roads constructed by State Departments of Transportation, as well as land development activities nationwide.

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[4] Sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311(a), 1344(a).

[5] *See*, 60 Fed. Reg. at 58,606 ("Mitigating the environmental impacts of necessary development actions on the Nation's wetlands and other aquatic resources is a central premise of Federal wetlands programs. The CWA Section 404 permit program relies on the use of compensatory mitigation to offset unavoidable damage to wetlands and other aquatic resources through, for example, the restoration or creation of wetlands.") *See also*, Royal C. Gardner, Mitigation, in WETLANDS LAW AND POLICY: UNDERSTANDING SECTION 404 (Kim Diana Connolly, Stephen M. Johnson & Douglas R. Williams, eds., American Bar Association 2005) (noting that mitigation is "a central premise of Federal wetland regulatory programs") (quoting White House Office on Environmental Policy, Protecting America's Wetlands: A Fair, Flexible, and Effective Approach (Aug. 24, 1993)).

A mitigation bank typically utilizes a medium to large degraded wetland site, and improves the ecological characteristics of the site through restoration and enhancement efforts, or through wetlands creation. Grading, hydrological adjustments, removal of vegetation and planting of new vegetation are typical activities involved in wetland mitigation. The units of restored, enhanced or created wetlands are expressed as "credits," which mitigation bankers sell to developers or other Section 404 permittees to offset the "debits" that will result from permitted filling at the project development site.

Congress has expressly recognized the role of mitigation businesses in the CWA. In 2004, Congress directed the Secretary of the Army to establish regulations for mitigation and mitigation banking under Section 404.[6] Starting in 1991, Congress identified mitigation banking as the preferred method of compensatory mitigation for wetland impacts from federally funded and interstate highway projects, first by authorizing use of federal funds to purchase mitigation bank credits and then, in 1998, by directing that mitigation banks be considered in the first instance to compensate for wetland impacts from federally funded and interstate highway projects.[7]

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[6] 33 U.S.C. § 1344, note (b), codifying the National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 314(b), 117 Stat. 1431 (2003).

[7] 23 U.S.C. §§ 103(b)(6)(M) and 133(b)(11). *See*, Surface Transportation Program, Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 1106(b), *amending* 23 U.S.C. § 103(b)(6)(M); Pub. L. No. 105-178, § 1108(a)(6), *amending* 23 U.S.C. § 133(b)(11). In 1991, Congress had expressly authorized federal highway funds to be utilized for wetland mitigation banking. *See*, Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 1006, *amending* 23 U.S.C. § 103(i)(13) (1991) (currently 23 U.S.C. § 103(b)(6)(M)); Pub. L. No. 102-240, § 1007, *amending* 23 U.S.C. § 133(b)(11).